# No. 15,052

# United States Court of Appeals

## For the Ninth Circuit

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EMPIRE PRINTING COMPANY,
a corporation,
*Appellant,*

vs.

HENRY RODEN, et al.,
*Appellees.*

**Upon Appeal from the District Court for the District of Alaska, First Division.**

## APPELLANT'S REPLY BRIEF.

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## Subject Index



## Table of Authorities Cited

### Cases



### Statutes



### Texts

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## APPELLANT'S REPLY BRIEF.

In the first several pages of the brief of appellees there is a statement of the case which states certain facts and then deals with the question of malice, which we think is immaterial to the argument before this Court. This statement in certain respects states as facts matters which were denied by the defendant and which at most presented a question for the jury. We think this is unimportant because if the appellant's specifications of error are well taken, the question of malice becomes immaterial.

### APPELLEES' VIOLATION OF THE LAW.

The appellees state at page 18 of their brief:

> "The great weight of the testimony, however, being that there was no violation of the law."

Appellant contended throughout the trial that whether there had been a violation of the law was for the Court to determine from the evidence and from the facts admitted, and not something to be submitted to the jury because appellee Roden's opinion was in the negative. The law is plain, and no opinion or hearsay testimony, such as we find at pages 413 and 416 of the transcript, could change it.

We repeat, as in our opening brief, the Attorney General was not called as a witness nor was any opinion of his offered at the trial. Neither the belief of Mr. Roden nor the opinion of the Attorney General, if there had been any such opinion, would make the slightest difference or relieve the appellees from liability for any violation of the law committed by them.

On page 30 of their brief appellees refer to the opinion of this Court in *Dimmick v. U. S.,* 121 F. 638, cited at page 37 of appellant's opening brief, and say the Court upheld the judgment of the trial court in that case "on the basis that the offense was a wilful and felonious failure to comply with the specified requirements of the Secretary of the Treasury". However, twenty years later, in the *Balint* and *Behrman* cases cited on pages 38 and 39 of our opening brief, the Supreme Court of the United States pointed out that under such statutes as those under consideration, ignorance and good faith are no defense. Such statutes create what are known as public welfare offenses, and under such statutes no felonious intent is involved and it is immaterial whether the act

denounced by the statute is committed wilfully or innocently. There are a great number of such statutes. Some of them deal with violation of the anti-narcotics law, some with the pure food law, some with automobile traffic, some with the Internal Revenue laws, and many deal with the handling of public funds. These statutes are enacted for the protection of the public and the interest and rights of the public far outweigh any considerations to the individual defendant involved. Appellant has cited some of the leading cases under these laws in its opening brief. A good illustration of the operation of these public welfare statutes and one for the protection of the public is found in the traffic laws. Good intentions are no excuse for noncompliance.

But, aside from all this, we submit that in this case the appellees surely must have set up the Ferry Fund wilfully when they, as the Board of Road Commissioners, passed the motion (R. 351-2) which appellant contends was designed to circumvent the law.

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LOAN OF PUBLIC FUNDS.

The cases appellant cites at pages 63, 64 of its opening brief seem to clearly hold that a bank deposit is a loan to the bank. Appellees cite at page 44 of their brief the case of *U. S. F. & G. Co. v. Carter,* 170 S.E. 764, but that case is not in point and is readily distinguishable, and we hardly think the Virginia Court attempted to overrule the Supreme Court of the United States in the case of *New York County Bank*

*v. Massey,* 192 U.S. 138, and the other cases which we have cited.

The laws of Alaska which were violated by the appellees were those requiring all public funds to be deposited in the treasury of the Territory and providing a penalty for noncompliance. The case of *U. S. F. & G. Co. v. Carter,* supra, dealt with the actions of the Treasurer under the laws of Virginia. The instant case is concerned with the actions of the appellees in the handling of public funds without transferring them to the Treasurer. Once the public funds are transferred to the Territorial Treasurer, the public is protected, because the laws of Alaska require a very substantial bond to be given by the Treasurer (see Section 7-1-4 ACLA 1949) and when the Treasurer deposits the public funds in a bank, he in turn requires the bank to secure the Territory, and Chapter 108 of the SLA 1953 empowers the banks which are depositories of public funds to pledge their assets and to give security to the Treasurer for the safekeeping of the funds. In this case the appellees placed the public funds in the hands of Robert E. Coughlin without any bond from him. He made the deposit subject to his own check and that of no one else. Surely under the circumstances this was a loan to the bank.

Appellees have not discussed in their brief the effect of the "advances" to Coughlin out of the Ferry Fund, or the "personal loan" to Steve Homer from the public funds, as shown by Defendant's Exhibit C, not printed.

TRUTH AS A DEFENSE.

Appellees devote some attention in their brief to the question of truth as a defense in a libel suit. Appellant has dealt with this in its opening brief and shown how the Court instructed that the truth of the statements made in the alleged libelous article would not be available as a defense to the appellant unless known at the time the article was written, and appellees now urge that this was not pleaded by the defendant. However, in paragraph 3 of the Second Affirmative Defense, found on pages 21, 41 and 49-50 of the Record, the defendant alleges as follows:

> "That in the venture of the Territory into the transportation business as set forth in plaintiffs' complaint, there has been a very substantial loss of public funds, not only in the purchase and repair of the vessel CHILKOOT, but in its operation, and one of the duties of the defendant is to inform the public of the facts and of all the irregularities in the handling of funds, whether these irregularities were in good faith or otherwise, and it was especially the duty of the defendant to publish such facts during an election campaign * * *"

Moreover, we do not think that the details of the loss of funds and the irregularities in the purser's accounts would need to be pleaded at all. Defendant discovered these details long after the pleadings were filed, and some of them on the eve of the trial. The Court rejected the evidence of the loss of the funds as it was offered by defendant, as set forth in detail in appellant's opening brief. Even if it had been

necessary to amend the answers to conform with the proof, under the Court's ruling defendant was denied that right, for the Court rejected all proof of the loss of public funds. However, we think all this argument in appellees' brief is beside the point, because not only was there positive allegation of loss of funds and of irregularities, but we think the pleadings were more than amply sufficient to raise the question. Furthermore, the offense committed by the appellees in diverting public funds from the course and disposition required by law was in itself sufficient to constitute a crime denounced by the statute and for which the same punishment was provided as that inflicted upon Oscar Olson, the former Treasurer of the Territory. The statute is designed to protect the public and to see that Territorial officials, with or without felonious intent, are prohibited from playing fast and loose with Territorial monies.

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LOST CHECKS.

We have covered this matter quite fully in our opening brief, and we repeat that it was in the power of the appellees to have produced or at least preserved for production all the checks issued on the Ferry Fund. They were all in office for a period of six months after they brought these suits and they should know what became of those checks. Appellant made every effort to have them produce the checks after discovering the Ehrendreich reports, and under the issues in the case, we think this is an instance where it was within the power of the appellees to

have supported their denial of irregularities by better evidence than they did produce, provided, of course, the checks would have been of assistance to them in meeting the allegations of loss of public funds set forth in the pleadings, and if the checks showed the ferry account to have been handled honestly.

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RUSTGARD v. TROY.

The appellees in their brief on page 51 refer to the case of *Rustgard v. Troy,* decided by the District Court for Alaska and found in 6 Alaska 338. They copy one sentence from the District Court's quotation from Newell on Slander and Libel. This sentence standing alone is incomplete. The entire paragraph cited by the Court there reads as follows:

> "While it cannot be said that the law upon this subject is very well settled in the United States, it seems clear that, when a man consents to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue so far as it may relate to his fitness and qualifications for the office, and publications of the truth on this subject, with the honest intention of informing the people, are not libels. It would be unreasonable to conclude that the publication of truths which it is the interest of the people to know should be an offense against the law. For the same reason the publication of *falsehood and calumny* against public officers or candidates for public offices is an offense most dangerous to the people and deserves punishment, because the people may

be deceived and reject the best citizens, to their great injury." (Italics ours.)

Newell on Slander and Libel, Third Edition, page 93.

We might add that on page 344 the Court disposes of the *Rustgard* case in language as follows:

"I do not see that any damage whatever, general or special, has been caused the plaintiff as the natural or proximate consequence of this publication.

The demurrer will have to be sustained."

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CONCLUSION.

Appellees have not met appellant's contentions raised in its brief or attempted to discuss the authorities we have cited, but they seem to have made a labored effort to make an argument based on refinements, nice distinctions and strained constructions to show that there is a difference between converting public funds to the personal use of appellees on the one hand and lending them and refusing to remit them to the Territorial Treasurer as the law requires, on the other hand, and under statutes where punishment for any one or all of these acts is provided in the same statute, and called embezzlement.

Dated, Juneau, Alaska,
September 12, 1956.

Respectfully submitted,
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*Attorney for Appellant.*